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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77 - 123

LOCAL NO. 757 OF THE ICE CREAM DRIVERS AND EMPLOYEES UNION, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and EMANUEL PARISH, Individually and as Secretary-Treasurer of said Local,

Petitioners,

-against-

BARCLAY'S ICE CREAM CO., LTD.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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Barclay's Ice Cream Co., Ltd. (Respondent) respectfully prays that a writ of certiorari not issue to review the decision of the Court of Appeals of the State of New York entered in this proceeding.

QUESTION PRESENTED

Does the State have the power, consistent with both the United States Constitution and the National Labor Relations Act, to enforce its public policy to protect the economy of a community by prohibiting coercive economic activities, where the object of such activities is to erect an embargo on the flow of out of state goods into New York?

STATEMENT OF THE CASE

The opinions reproduced by Petitioners in their Appendix "C" and Appendix "E" support the following factual recitation. Additionally, citations preceded by "R" refer to pages of the Record in the New York Court of Appeals.

A. The Commencement of the Action

This action was initiated by service of an order to show cause signed by a Justice of the Supreme Court, New York County on July 17, 1975 (R.18). Respondent sought an injuction *pendente lite* in order to prevent immediate and irreparable injury by the continued coercive and tortious acts of the Petitioners undertaken by them for the purpose of interfering improperly with the conduct by Respondent of its trade and business (R.23-56). Petitioners, it was claimed, by their acts sought to erect an embargo on the flow of out of state goods into New York in violation of the state's public policy. There was no claim that Petitioners were conduction a secondary

boycott in violation of the LMRA; it was claimed that Petitioners were conducting a consumer boycott - one which was so offensive to the declared public policy of the state that it could be acted against by the state, whose power to so act was not preempted.

B. The Showing by Respondent on the Motion for a Temporary Injunction

Respondent, a New Jersey Corporation has been since late 1974 an ice cream distributor. It obtains ice cream from suppliers and manufacturers and distributes in turn to retail outlets in New Jersey and New York. Its employees are covered by a collective bargaining agreement with New Jersey Teamster Local 680 of the very same parent union as that of the Petitioner, New York Teamster local. That is: both the New Jersey Local 680 which has a collective bargaining agreement with Respondent and the Petitioner New York Local 757 are each affiliated with the Teamster Union International (R.24).

The Record on Appeal and the Appellate Division findings of fact reflect that:

1. The two manufacturers of ice cream who supply Respondent with product, also are both parties to collective bargaining agreements with Teamster Union locals in their respective areas so that *all concerned* are affiliated with the same Teamster Union International (R.33-34).

2. There is thus, no question of inter-union rivalry or of Respondent handling non-union made ice cream. There is no dispute

over wages or conditions of employment with Respondent's employees or the employees of the Teamster Union covered companies which manufacture the ice cream supplied to Respondent . New Jersey Teamster Local 680 and Respondent maintain excellent relations. (See also Petitioners' Appendix "C," pp. 4-5; Appendix "E," pp. 7-8.)

The issue is whether Petitioners can, by exerting coercive economic pressure as against Respondent, require it to distribute in New York only ice cream manufactured in New York, and thus impede the flow into the state of out of state goods.

Respondent's principal, Henry Landau, had been in the ice cream business in the New York City area for many years (R.25). From his long experience he came to know the officials of the various New York supermarket chains and cooperatives. With an associate he acquired the Dolly Madison plant, which is in New Jersey and improved it to the end of continuing in the ice cream distribution business. Respondent greatly improved the plant at a cost in excess of a quarter of a million dollars. By February 1975, Respondent was operational (R.26).

The actions of the Petitioners, as more fully described below, were designed to have the effect of denying Respondent access on a competitive basis (as compared to those distributors whose employees are members of New York Teamster Local 757 and who thus have a favored relationship to this particular union local) to New York supermarket chains and cooperatives. Without access to them a large ice cream

distributor would be unable to survive financially.

What labels the dispute by the Petitioners as totally without justification, is that as the Appellate Division found, most of the ice cream supplied to New York chains and cooperatives by Petitioner Local 757 drivers, employees and employer-distributors is not only manufactured outside of New York, but (and this is distinction to Respondent's situation) a large part is so manufactured *by non-union shops* (Petitioners' Appendix "C").

One need not have a picture painted to figure out how some companies with the full knowledge of Petitioners, are able to bring into New York, without any interference by these teamsters, not only out of state product but non-union made ice cream. The companies were specifically identified (R.29-31). To be sure, on oral argument Chief Judge Brietel observed: Could we (on the Court) not view what has taken place here by the union as a type of racketeering which ought not be tolerated?

The reason for the out of state supply is that the demand for ice cream in New York City is far greater than its manufacturing capability. New York City's plants are antiquated and cannot be modernized without substantial capital investment. There is also a substantial electric cost differential between New York City and other areas. As a result of this great demand all New York distributors, particularly companies which have collective bargaining agreements with New York Teamster Local 757 buy ice cream from manufacturing companies outside of New York City (R.28).

Petitioners assert the need to bar respondent from supplying New York chains and cooperatives with ice cream manufactured outside of New York in order to "help protect jobs in this community" (R.40). Aside from the patent unlawfulness of this as an objective (which would have the effect of erecting a private embargo on foodstuffs entering New York), the fact is that when it comes to companies in New York which have collective bargaining agreements with Local 757 the purported "need to protect jobs in this community" is ignored as is the matter of their dealing in non-union product.

Two of the largest New York distributors which have collective bargaining agreements with Petitioner Local are Priscilla Ice Cream Company, located in Brooklyn, New York and Calip Dairies, also located in Brooklyn, New York. Both supply major New York City chains and cooperatives. Calip supplies into New York ice cream manufactured in New Jersey and Pennsylvania. Priscilla not only distributes out of state ice cream, but it is permitted by Local 757 to distribute into the New York area ice cream which is not only made out of state, but by non-union manufacturing plants. Another 757 distributor, Ron Ennis, located in the Bronx, New York, distributes into the New York area ice cream which is also made outside the state and by non-union shops. (Other instances are detailed in R.29-31, see also Appellate Division findings of fact, Petitioners' Appendix "C.")

Respondent is not able to enter into a collective bargaining arrangement

with Petitioner New York Teamster Local 757 to gain the apparent "preferred" treatment accorded by it to certain companies employing its members, since Respondent is New Jersey based and already under contract with New Jersey Teamster Local 680, which as earlier noted, is part of the very same Teamster Union International as Petitioners.

The guise is to protect New York jobs by forcing Respondent to buy only New York manufactured ice cream. But the purpose and affect thereof and the enforcement of such a rule, is to exclude Respondent from the lucrative New York markets. Even assuming arguendo the good faith of the Petitioners,* the coercive conduct undertaken and which they continue and which they continue to threaten is for an illegitimate goal, i.e. as their literature states, to set up a barrier to the sale of out of state products and this is unlawful.

When Respondent's New Jersey plant-depot first became operational in

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* This really is so hard to do, the Petitioners are Teamsters and of course it is conceded that Respondent is under contract with New Jersey Teamsters as are Respondent's suppliers. What with these facts being known and Petitioners permitting "special" companies to deal not only in out of state product but non-union product, could we not embrace the suggestion contained in Chief Judge Brietel's question, above at p. 5.

February, 1975 its principal, Mr. Landau, arranged to meet with chain and cooperative store buyers in the New York City area. In turn suppliers and manufacturers were lined up to furnish needed product.

In order to prosper and keep a chain or cooperative as a customer Respondent must be able to arrange with manufacturers to also at times furnish economy product (termed "low ball" product in the industry) which is a line much in demand in the supermarkets. And, the manufacturer must also be willing to prepare private labeling, that is supermarkets want to carry ice cream bearing their own name. In addition, for Respondent's business to grow it must have a manufacturer willing to carry its own label when it so desires.

Respondent successfully negotiated with two *teamster union* suppliers and manufacturers - Penn Dairies, Inc., located in Lancaster, Pa. which has a collective bargaining agreement with Teamster Local 771 of the very same parent as Petitioner Local 757 and Dairy Services of Ohio, Inc., located in Coshocton, Ohio, which has a collective bargaining agreement with Teamsters Local 637 also of the very same parent as Petitioner Local 757.

Any claim that the product Respondent furnishes is made under "substandard labor conditions" is irrelevant (and to be sure, false as the Appellate Division found) to the issue of whether a labor dispute exists, since both manufac-

turers are covered by agreements with Teamster locals occupying the same position as Petitioner 757 and all are accountable, as is 757 to the one Union International. And, Petitioners have no jurisdiction over these employees situated as the employees are in Ohio and Pennsylvania.

As soon as Respondent obtained approval from supermarkets to supply them, Respondent received word from Petitioners that it would not be permitted to supply any supermarkets in New York.

Respondent's President then arranged to meet with Petitioner Parish. Parish stated that he and the local wanted Respondent to stay of the New York supermarkets. Parish later stated Respondent could sell in New York, but only if it bought ice cream from New York companies which he named. This would mean Respondent's demise and would secure for distributors covered by collective bargaining agreements with Petitioner Local 757 sole and exclusive competitive access to the supermarkets, though such Local 757 distributors supply to these markets out of state as well as non-union made ice cream.

Despite Petitioners' position, Respondent commenced supplying the said supermarkets. The literature set forth at R. 40 to 44 was then immediately sent to the supermarkets. Petitioners' literature in effect, means that Respondent could deal with chains and cooperatives, but only if it obtained product solely from New York manufacturers. This rule (not applied to distributors covered by

Petitioner Local 757 collective bargaining agreements) has the effect of effectively keeping Respondent from selling to the supermarkets.

In an effort to comply with this unlawful rule and avoid continued conflict with Petitioners, Respondent turned to New York manufacturers named by Petitioner, Parish for supplies. Each one was unable (or unwilling) effectively to service it or enable it to compete with Local 757 distributors who are free to obtain product from out of state, albeit non union sources and this without complaint by Local 757.

Marchiony Ice Cream Corp., Brooklyn, New York wrote (R. 45) that it lacked the facilities to supply Respondent. Respondent called upon R & G, located in the Bronx, New York. They would not private label and had no low ball product facilities to manufacture the amounts needed to supply supermarket volume. Respondent contacted Vroman Foods of New York, Inc., and while they would private label they lacked facilities to meet a supermarket volume and deal only in ice cream novelties, i.e. sandwiches, pops, dixies, etc. Finally, Respondent was forced to deal with Meadowgold. Here again it could not get private labeling and the cost was 5¢ a gallon more than what competitors were able to pay by securing product as Respondent wished, from out of state. If Respondent cannot private label, it winds up promoting another's product as opposed to its own.

As stated before, without supermarket business Respondent would fail. Without being able to get a low ball product, private labeling, great volume and liberal credit (30 days) terms from manufacturers as was available from Penn Dairies and Dairy Services of Ohio, Respondent could not service the markets and these things were not available from New York manufacturers.

There is no valid claim of ice cream being made under "substandard conditions" since, as pointed out earlier, both manufacturers are teamster local union shops and the product of Penn Dairies is sold to and labeled for Schrafft's and Stouffer's in New York without incident by Petitioners.

C. The Petitioners' Opposition

To this detailed factual presentation, Petitioners offered no factual dispute. They offered only the affidavit of Emanuel Parish submitted in opposition to the motion as set forth at pp. 64 to 67 of the Court of Appeals' Record on Appeal.

D. The Appellate Division Findings of Fact

In December, 1975 the matter came before the Appellate Division. The findings of fact that court made were not only supported by the record, but adhered to unanimously on a failing motion for reargument (R. 73).

The findings of facts were:

1. Respondent is a New Jersey corporation and it obtains union made ice cream from manufacturers in Pennsylvania and Ohio for distribution at wholesale to its customers in New York and New Jersey and these Pennsylvania and Ohio manufacturers also have collective bargaining agreements with duly constituted Teamster Locals in their respective locales;

2. Local 757 is affiliated with the Teamsters Union and represents employees who manufacture ice cream in New York City;

3. Respondent's employees and the employees of its suppliers are all represented by teamster local unions affiliated with the Teamsters Union International which is the same parent as is Petitioner local;

4. Local 757 wrote letters to a chain of retail food markets advising of its intention to picket outside their stores and to distribute handbills asking consumers not to buy Respondent's ice cream because it was manufactured under sub-standard labor conditions;

5. There is no basis in the Record for the statements that Respondent's ice cream is manufactured under sub-standard labor conditions;

6. The controversy involves no existing or prospective agreement concerning employment, wages, hours or working conditions;

7. There is no question concerning the handling of non-union products or of inter-union rivalry for all concerned are related to the one parent union;

8. The demand for ice cream in New York City is far greater than the manufacturing capability of its plants;

9. Most of the ice cream supplied to New York City chains and cooperatives is delivered by Local 757 drivers and is manufactured outside New York, largely by non-union shops;

10. Of critical importance was the additional finding that: "The purpose of defendants' activities which are sought to be enjoined is to deny plaintiff access to New York City markets on a competitive basis, thus keeping away from the New York City market ice cream manufactured elsewhere.";

11. Further, the Court found that the "information contained in the handbills to be distributed by the pickets is misleading as indicating that there is a labor dispute whereas none exists" (Petitioners' Appendix "C");

At oral argument, Mr. Justice Nunez posed the following question to the attorney for the union:

> Suppose your union represented workers employed in New York County below 14th Street, do you believe that the state would be without power to protect the economy of its people if you

chose to bring coercive economic pressure to prevent distributors from dealing in union made ice cream manufactured above 14th Street.

The union attorney responded that in his view the State lacked the power to deal with such conduct.

Acceptance of the union view would lead to justifying locals in each county, though part of the same Union International, having the right to threaten coercive economic pressure against goods coming in from any other county even within the same state.

What immense power, and opportunity for abuse, this would place in the hands of each local teamster official. How vehemently each company would press in order to win the pleasure of such officials in each local to assure the kind of favored treatment which apparently some companies presently have as indicated by the references at R. 29-31 so that they could do business in all of the counties of a given state without incident.

This case raises the vital question whether or not the state has been left with the power to deal with such a danger of economic stagnation and to act to protect the consuming public.

E. The Court of Appeals Opinion

The Court of Appeals unanimously upheld the order of the Appellate Division. The Court of Appeals held, based on holdings of this court, that Congress had not intended to preclude the states from regulating conduct touching interests deeply rooted in local feeling and public responsibility simply because a union was involved.

So too, the courts below embraced the still vital approach to the issue of preemption, that federal law does not withdraw from a state its power to regulate where the activity is of merely peripheral concern to the Labor Management Relations Act.

It is clear from the opinions below that the courts feared the drastic economic consequences to a community were the conduct of the petitioners to be left unregulated.

The Court of Appeals applied the proper preemption standards to these peculiar set of facts.

REASONS WHY THE WRIT SHOULD NOT ISSUE

The decisions below turned on the special facts of this unique case.

Here a New Jersey Ice Cream Co. (whose employees were members of a New Jersey Teamsters local and whose suppliers also had collective bargaining agreements with Teamster locals in their respective areas of Ohio and Pennsylvania) was subjected to coercive economic pressure in the form of false and misleading picketing by a New York Teamster local which claimed that Respondent's product was made under substandard conditions and as a result, New Yorkers should buy only ice cream made in New York. The claimed purpose was to keep from New York any foodstuffs made outside the state. There was no question of inter-union rivalry or any controversy as to existing wages, employment or the handling of non-union products. To be sure, Petitioner Union 757 as is the Union representing Respondent's New Jersey employees and its Ohio and Pennsylvania suppliers are all teamsters and responsible to the same Teamster Union International.

Under these circumstances the courts below were correct in determining that the purpose of Petitioners' activities was to deny Respondent access to New York City ice cream manufactured elsewhere. The Appellate Division found as a fact that while professing to be concerned about the status of its members, the Petitioner local permitted its members to deliver into

New York (for certain companies) ice cream not only made outside the state, but manufactured by non-union shops (Petitioners' Appendix C, p. 5).

Vitally concerned about the state of the economy and the ability of consumers to have access to products wherever made in the United States or for that matter from one county to another within the state, the courts below applied the deeply rooted state public policy to the effect that it is improper to create a private embargo to prevent food from entering New York from without the state or to permit a Union in one county, e.g. to prevent goods made in another county within the state from coming into New York City. Any other result would create chaos resulting in untoward power being vested in the hands of Teamster officials as companies sought to win the pleasure of a union official in order to deliver goods into the City. The eventual loser would be the consumer. What the courts of New York confronted was in reality a form of racketeering by the Teamsters where to be able to deliver goods into New York, the out of state concern had to do the right thing.

The courts below applied the proper tests as to preemption: (1) is the activity arguably protected or prohibited by the LMRA? (2) is the matter of peripheral concern to the LMRA and the kind of conduct touching interests deeply rooted in local feelings? (3) is the conduct such that Congress intended it to be unregulated and

left to be controlled by the free play of economic forces? Measured against each of these tests the state should not be preempted and the court below was clearly correct.

As to the First Amendment (Fourteenth Amendment) argument, the Court below clearly was correct in holding the conduct subject to regulation for the state has a profound interest, as this Court noted, in preserving its economy against stagnation that could result from the disruption of business by picketing.

The courts below decided this case in accordance with the holdings of this Court. There is no conflict with any holding of this Court or federal law. The decisions below turned upon the special facts in this case.

ARGUMENT

THE STATE HAS THE POWER, CONSISTENT WITH BOTH THE UNITED STATES CONSTITUTION AND THE LABOR MANAGEMENT RELATIONS ACT, TO ENFORCE ITS PUBLIC POLICY IN ORDER TO PROTECT THE ECONOMY OF A COMMUNITY BY PROHIBITING COERCIVE ECONOMIC ACTIVITIES IN THE FORM OF PICKETING, PUBLICITY AND THE LIKE, WHERE THE OBJECT OF SUCH ACTIVITY IS TO ERECT AN EMBARGO ON THE FLOW OF OUT OF STATE GOODS INTO NEW YORK.

THE ORDER BELOW WAS THEREFORE, IN ALL RESPECTS PROPER.

This argument presents the following issues: (1) Are the courts of New York preempted by federal law from acting in this case? (2) Did the order below offend Petitioners' constitutional right to free speech?

The courts below properly held: (1) the professed objective of the Petitioners did not involve a genuine labor dispute; (2) the objective was unlawful; (3) the consumer boycott did not involve an arguably protected activity or an arguably unfair labor practice under the LMRA requiring the state court to yield to federal jurisdiction, the matter is clearly of peripheral concern to the LMRA and there is involved the kind of conduct which if unregulated could visit dire consequences to the economy of a community.

Thus, the state was free to regulate conduct which ran counter to principles deeply rooted in local feeling and responsibility, e.c. that there must be no barrier to the flow of goods into the city from either out of state or from counties outside New York City.

The courts below properly rejected the argument of preemption

If the activities the State purports to regulate arguably constitute either an unfair labor practice or are protected due regard for the Labor Management Relations Act, 29 USC 141, requires that state jurisdiction yield. *San Diego Building Trades Council etc. v. Garmon*, 359 US 236 (1959) So too, if it can be said that Congress intended the conduct to be unregulated preemption would follow. Lodge 76 v. Wisconsin Employment Relations Commission 427 US 132 (1976).

Focusing on the facts of the case at bar, were the union to be engaged in a secondary boycott there, of course, would be preemption and the state court would have to yield. But, Petitioners have studiously avoided running counter to the secondary boycott prohibitions of Section 158 (b) 4 of Title 29 by framing the offending literature to create only a consumer boycott. See *National Labor Relations Board v. Fruit and Vegetable Packers*, 377 US 58 (1964). Conduct of the type undertaken in the case at bar is thus not prohibited by the LMRA. This, however, does not make the conduct protected against state action.

That we are involved only with a consumer boycott not a secondary boycott is established in this controversy under the doctrine of the "law of the case" (Appendix B, p. 3).

On July 28th, 1975 Petitioners removed this case to the federal court arguing that the federal court had jurisdiction

since the complaint alleged a secondary boycott. We argued, as herein, that Respondent had alleged only an improper consumer boycott. On September 10th, 1975, United States District Judge Bonsal issued his memorandum decision and wrote:

> "Defendants removed this action from the Supreme Court of the State of New York, New York County. Plaintiff moves to remand it to that Court. *Since the complaint alleges only a consumer boycott, no federal jurisdiction is present.* Beacon Moving and Storage, Inc. v. Local 814, 362 F. Supp. 442 (S.D.N.Y. 1972). See NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760, 377 U.S. 58 (1964). Plaintiff's motion to remand is granted. Settle order on notice." (Emphasis added) (Appendix A)

There being no allegation of a secondary boycott the state ought to be free as this court held, to take steps to prevent economic stagnation by conduct of the type complained of. See *American Radio Association v. Mobile Steamship Association*, 419 U.S. 215 at P. 228 ff (1974).

Conduct having the *objective* sought by defendants runs counter to the deeply rooted public policy of the state. *Mayer Bros. Poultry Farms v. Meltzer*, 274 A.D. 169, 80 NYS2d 874.

The acts complained of are not protected by Section 158(c) of Title 29, USC which was enacted only for a narrow purpose. See footnote 5, *Linn v. Plant Guard Workers*, 383 US 53 at 62 (1966). What is left to the states has been held as follows:

> "In this respect, the Court concluded that the states need not yield jurisdiction 'where the activity regulated was a merely peripheral concern of the Labor Management Relations Act...[o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.'" *Linn, supra.*

In *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954), the Court held:

"To the extent...that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the Garner case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived." At 665.

In *United Automobile Workers v. Russell*, 356 U.S. 634 (1958), the Court upheld state jurisdiction to entertain a compensatory and punitive damage action by an employee for malicious interference with his lawful occupation.

The Court further stated in *Linn* that:

> "We similarly conclude that a State's concern with redressing *malicious libel* is 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by Garmon."

It is critical to note that in each of these cases there was at least conduct occurring in the course of a true labor dispute. (See in particular *Linn*). Nonetheless, the matter was deemed of too peripheral concern to the LMRA, involved as it is with safeguarding the right to organize and bargain collectively, to warrant preemption. *A fortiori*, there is no preemption in a case such as the one at bar where there is no genuine labor dispute. Petitioners' conduct is contrary to the state's "deeply rooted" public policy and their objective to erect an embargo on out of state goods is intrinsically unlawful.

The state is left with the power to protect citizens, personal or corporate, from libel (*Linn*) or interference with lawful occupation or business (*UAW v. Russell, supra*) and to uphold its declared public policy against unlawful acts.

In line with the recently decided case of Lodge 76 v. Wisconsin Employment Relations Commission, 427 US 132 (1976) it can not be the case that Congress intended Petitioners' behavior to be left to be controlled by "the free play of economic forces". The word "union" is not a talisman in whose presence the state's power to regulate such coercive conduct simply fades away.

The cause of action set forth in the complaint is based on two torts: (1) Petitioners are subjecting Respondent to economic pressure and thereby injuring its business without justification in law. *Goodwins Inc. v. Hagedorn*, 303 NY 300 (1951), (2) libel in the defamatory statement that the teamster union made out of state ice cream being distributed by Respondent is manufactured under substandard labor conditions. *Cheyne v. Ferro*, 56 Misc. 2d 1010.

As to the impropriety of the Petitioners' objective, *Mayer Bros. Poultry Farms v. Meltzer*, 274 AD 169, is in point. Decided in 1948, it still represents the state of the law as to the impropriety of the union *objective* i.e. to erect a barrier to the sale in New York of goods made outside the state. It no longer expresses the law on the power of the state to deal with secondary boycotts, i.e. the *means* used to accomplish the objective in that case. *Mayer*, unlike the case at bar, dealt with a secondary boycott as the *means* to accomplish an illegal *objective* Until 1959 the year in which 29 USC 158(b)4(ii) was added, the state had the power to deal with secondary boycotts. In *Mayer* the court discussed the impropriety of the *means* (secondary boycott) and the *end or objective* (embargo). While the *means*

discussion in *Mayer* is no longer of value, the *ends* or *objectives* discussion still represents sound law.

In *Mayer*, a labor union sought by picketing at retail stores handling poultry slaughtered outside the city to keep from city markets such goods so as to obtain better wages due to a more favorable economic climate than would otherwise prevail and to insure that its employees would have work in New York. The language of the court is so clearly on point that it must be quoted at length. The Court stated:

> "There is no labor dispute between these parties. The controversy involves no existing nor prospective agreement concerning employment, wages, hours or working conditions. The defendant is not seeking to enroll plaintiff's employees as members of its union, which would be impossible, in any event, inasmuch as defendant's membership are required to be New York City operatives, whereas plaintiff's poultry is slaughtered in New Jersey. There is no question concerning the handling of non-union products nor of inter-union rivalry. Plaintiff's employees are members of locals affiliated with the same parent union as the defendant. The shochet who slaughters plaintiff's poultry in New Jersey is a member at large of the same parent union. It is

not necessary to consider whether, or to what extent, it would alter the result if some of these circumstances were absent. This is not a labor dispute under the broadest construction of that term.

* * * * * *

"The purpose of defendant's activities which are sought to be enjoined, as alleged in the complaint and moving affidavits and admitted in an affidavit by defendant's president, is to keep away from the New York City market all frozen kosher poultry slaughtered elsewhere. Plaintiff's frozen products had been making inroads in this area, and were evidently resulting in reductions in prices to consumers and in reduction of the quantity of poultry slaughtered in New York City. Defendant's aim is to limit this market to poultry which is slaughtered in this city, so as to obtain better wages due to a more favorable economic climate than would otherwise prevail.

"The defendant contends that since wages may indirectly be affected, this is a legitimate labor objective. It is true that the pay of the shoctim from their employers varies with the quantity of animals which they kill, and that their remuneration is affected by the

number of fowl that they slaughter. This is not different in principle from the basis on which any pieceworker is paid, and it does not transform into a labor matter every economic question affecting the volume of the employer's business. The defendant's contention overlooks the fact that there is no dispute concerning wage scales. It does not appear that any demands for a higher rate of pay have been made against the employers of defendant's members, let alone against plaintiff.

"A private embargo to prevent foodstuffs from entering New York City is not a lawful objective, and is not made so by using procedures which would be legitimate if directed toward the accomplishment of other purposes."

Addressing itself to the deeply rooted state's concern and responsibility (which the Supreme Court in *Linn, supra* and *Garmon, supra,* held is not to be preempted) the Court stated:

> "Except under the police power, even the legislatures of the states are not permitted to erect embargoes, which is a prerogative of the Congress alone, and even that is forbidden except against foreign trade. Constitution of the United States, Article I, sections 8, 10. If the courts were to tolerate the erection of effective barriers of this sort by employers or employees whenever either shall think it to be to their economic interest to do so, what has been done in this

case respecting poultry could be done with regard to other kinds of food or merchandise. In the case of foodstuffs alone, the disastrous consequences of such embargoes need not be left to the imagination, in a community which is as dependent upon outside sources of supply as the City of New York. That is the interest of the consuming public in this issue. The law does not ignore these realities.

* * * *

"The present case involves interstate commerce, inasmuch as the frozen poultry is imported into New York City from New Jersey; but the circumstances that it comes from without the state is coincidental, inasmuch as the barrier which the defendant has established applies equally to poultry slaughtered in Westchester County, for example, or in any of the other counties in this state.

* * * *

"Controlling features in this case are that the purpose of defendant's picketing to erect an embargo against the importation of frozen kosher poultry into New York City is an unlawful objective; that no labor controversy of any kind is involved; that the information on the signs carried by the pickets, informing customers of the retail

stores and butcher shops handling plaintiff's goods that poultry is used which has not been slaughtered by members of defendant's union, while technically accurate, is actually misleading as indicating that there is a labor dispute whereas none exists; that these signs are not displayed for the purpose of publicizing any legitimate grievance of the union, but rather as a verbal act in a conspiracy to accomplish an unlawful purpose."

The court went on to state that if the objective were unlawful the conduct is not protected "by using procedures which would be legitimate if directed toward the accomplishment of other purposes." Peaceful picketing which is not for a lawful labor objective is tortious.

In the case at bar, the courts below found that the Petitioners were responsible for misleading materials being circulated for the purpose of injuring Respondent's business.

We deal then in the case at bar with coercive economic pressure and turn to *American Radio Assn. v. Mobile Steamship Assn.*, 419 US 215 (1974). Though repeatedly pressed by us in our briefs below and upon oral argument in answer to the union's First Amendment claim (as embodied in the 14th Amendment) the Petitioners have chosen to ignore discussing this case.

There, an association of companies and a shipper sought injunctive relief in the state against peaceful picketing of a foreign ship by the Unions. The unions claimed the wages aid the foreign crewmen were substandard. And, it was claimed their employment damaged the wage standard and resulted in a loss of local jobs. "Help the American Seamen" was the plea. First the Unions raised the issue of preemption to counter the state court injunction. This Court held the doctrine of preemption not applicable for reasons unrelated to our case, i.e. that the NLRA was not meant to apply to activities which so directly affect the maritime operations of foreign vessels.

As a second argument, however, the Unions claimed that their constitutional rights were abridged for they were peacefully picketing and simply expressing their views. It was this Court's response starting at P. 228, which disposes as well of the Petitioners' constitutional argument herein. This Court wrote:

> "Petitioners repeat their First and Fourteenth Amendment arguments before this Court. They contend that the picketing was expressive conduct informing the public of the injuries they suffer at the hands of foreign ships, and 'imploring the public' to 'Buy American' or 'Ship American.' Brief for Petitioners 21. This conduct, they contend, constitutes 'the lawful exercise of protected fundamental rights of free speech,' and is thus not subject to injunction.

> "We think this line of argument is foreclosed by our holding in *Vogt, supra*. There the Court, in an opinion by Mr. Justice Frankfurter, reviewed the cases in which we had dealt with disputes involving the interests of pickets in disseminating their message and of the State in protecting various competing economic and social interests. *Vogt* endorsed the view that picketing involves more than an expression of ideas, 354 U.S., at 289, and referred to our 'growing awareness that these cases involved not so much questions of free speech as review of the balance struck by a State between picketing that involved more than 'publicity' and 'competing interests of state policy.' *Id.*, at 290. The Court concluded that our cases 'established a broad field in which a State, in enforcing some public policy, whether ennounced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy.' *Id.*, at 293. We believe that in the case now before us Alabama's interference with petitioners' picketing is well within that 'broad field.'
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> * * * *
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> "Petitioners' second argument is that the injunction here is not supported by a 'valid public policy,' as required by *Vogt*. They point

out that while the Alabama Supreme Court stated the public policy to be the prevention of 'wrongful interference' with respondents' businesses, it did not expressly define that term. We, however, think it obvious that in this context 'wrongful interference' refers to efforts by third parties to induce employees to cease performing services essential to the conduct of their employer's business. That third party participation is critical to picketing being categorized as 'wrongful interference' is clear from *Pennington v. Birmingham Baseball Club*, 277 Ala. 336, 170 So. 2d 410 (1964), a case cited by the Alabama Supreme Court in its opinion in this case.

* * * *

"The State's policy also appears to be based on the state interest in preserving its economy against the stagnation that could be produced by pickets' disruption of the businesses of employers with whom they have no primary dispute."

In the case at bar, there is no 'primary dispute.' (c.f. NLRB v. Fruit & Vegetable Packers, 377 US 58 (1964); NLRB v. Servette, 377 US 46 (1964) There is on the other hand, a 'valid public policy' in preventing the erection of embargoes. The state has every right to preserve its "economy against the stagnation that could be produced"

by a successful campaign to force out of state concerns to sell in New York only ice cream made in New York. State Law provides a remedy for a cause of action such as that pressed by Respondent *Cheyne v. Ferro*, 56 Misc. 2d 1010.

Coercive economic pressure is obviously more than speech: it is "speech plus". And, in that context this Court has focused on the nature of the objective or purpose in deciding whether it may be prohibited or regulated. *Giboney v. Empire Storage & Ice Co.*, 336 US 284 (1957) cited with approval and relied on in *American Radio, supra; Hughes v. Superior Court*, 339 US 460 (1950).

If ever there was the need to permit the state to strike a balance between picketing, publicity and the public policy of a state, this is such a case. Carried to its logical conclusion, and as candidly acknowledged at oral argument before the Appellate Division, the Petitioners' view would leave the state powerless to protect the consuming public against union locals imposing inter-county bans and the like. Acceptance of the Petitioners' position would lead to utter chaos, to the detriment of the public. This touches on a matter of vital concern to the interests of the people of the state. To be sure, the good faith of the Petitioners fades when recognition is given to the fact that the Respondent's employees, as well as the employees of the two companies in Ohio and Pennsylvania which supply ice cream, are all members of the very same Union International as are the

members of Petitioner union. One cannot ignore too, the fact that this coercive pressure exerted upon Respondent has not been applied to other companies, which for some as yet undisclosed reason, are able to freely bring in out of state product and *non union made product* with the full knowledge of Petitioners.

CONCLUSION

The writ should not issue.

Respectfully submitted,

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